United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPELLANT'S BRIEF AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

278

No. 17,190

SAM PHILLIPS,

Appellant,

v.

SAM KINGSLEY,

Appellee.

Appeal from the United States District Court
for the District of Columbia

SAM PHILLIPS

327 Bond Building
Washington 5, D. C.

Appellant Pro Se

QUESTION PRESENTED

Is a subordinate official of the Federal Government cloaked with absolute privilege for the alleged commission of a libel in a field of activity in which the head of the agency involved has specifically determined that the agency would not participate in?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 17,190

SAM PHILLIPS,

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v.

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Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia which granted the motion for summary judgment in behalf of the appellee (defendant) on the ground that absolute privilege attached to the defaming torts. The appellant seasonably noted an appeal from the granting order to this Court which has jurisdiction by virtue of Section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE

Appellant while an employee of the U.S. Patent Office in 1957 had sought the assistance of the appellee to obtain education under the Korean G.I. Bill, Public Law 550, in patent law and scientific subjects. At the time, appellee refused the request. At a subsequent date in February 1960, the appellant submitted his resignation from the Patent Office effective May 6, 1960, which the appellee subsequently updated to March 24, 1960. Appellant also wrote a letter to the Commissioner of Patents asking similar assistance in his difficulties with the Veterans Administration. This was apparently referred to the appellee who stated in writing to the Commissioner of Patents that (1) he did not aid the appellant in his previous request for assistance because the facts he wanted to present to the Veterans Administration were not true, and (2) he had previously requested the appellant to go to his supervisory examiner to work out such a program and appellant refused. The appellant of course contends that both of these statements were untrue and libelous per se.

The controversy between the parties does not involve any action of the appellant as an employee or his official duties, any statutory, official, or otherwise legitimate functions of the Patent Office, or finally, the official duties of the appellee as the Personnel Officer of the Patent Office.

The area of this particular controversy, the recommendation of a course of study to qualify in the patent field, has long been one in which the Patent Office has refused to enter.

SUMMARY OF ARGUMENT

The subject matter out of which the alleged defamation arose, the recommendation of a course of study to qualify in the patent field, was one in which the Commissioner of Patents has determined would not be a field of activity for his agency. Therefore, any statement made by the

appellee was, ipso facto, not within the official duties of his position as to cloak him with absolute privilege for the consequences of said statement.

ARGUMENT

The doctrine of absolute privilege with resultant immunity from suit, if applicable here, would bar the appellant from any relief. In the past years, the Courts have amplified and extended said doctrine which gives absolute immunity from tort liability to government officials and employees for torts committed within the scope of their official duties. This doctrine first started giving protection to Judges, was then extended to prosecuting attorneys, and finally extended to cabinet officers and their subordinate officials. Barr v. Mateo 360 U.S. 564. The rationale behind such a doctrine is that the public will derive a greater good and benefit if government officials and their subordinates are free from worry about suit and resultant financial liability while carrying out their duties. However, the official is protected only if such protection actually serves the needs of the public; it is the public's welfare, not that of the official that is paramount. De Arnaud v. Ainsworth, 24 App. D.C. 167. Official duty and accompanying immunity have been held to be applicable regarding press releases explaining agency action, Barr v. Mateo, supra., report of an investigator, Poss v. Liberman 187 F. Supp. 841, statements made in connection with matters committed by law to an official's control or supervision, Glass v. Ickes 117 F2d 273, 73 App. D.C. 3. It is further admitted that the exact limits of his official authority may not be readily apparent to an official, and the actual extent of his authority may be part of the task committed to his judgment, Spalding v. Villas 161 U.S. 483.

In this case, however, the area of controversy is one in which the head of the agency has specifically stated is one in which the Patent Office will not enter. The most recent statement is set forth on Page 2,

General Requirements for Admission to Practice Before the Patent Office, March 1962, as follows:

> "The Patent Office cannot recommend courses to be pursued in preparing for the examination, nor offer advice as to special training required of persons who wished to be qualified to practice before the Patent Office as patent attorneys or patent agents."

In effect, the agency head, the Commissioner of Patents, has determined that the agency will not concern itself with this area; such a determination has the effect of law, 35 U.S.C. 6. Can appellee now claim that a statement concerning such an area constitutes official duty in the face of the determination by his superior? If the matter is one in which the Patent Office will not concern itself, what public interest is involved? If the area is one outside of the concern of his agency, then appellee has entered without his cloak of absolute privilege. Unlike Poss v. Liberman, supra, there is nothing in the record from any official of the Patent Office superior to the appellee that the action was within the scope of appellee's duties. To uphold the action of the Court below would in effect extend the doctrine of absolute privilege to non-official and unessential acts of government employees beyond the scope of its effect as defined by this Court and the Supreme Court; as stated by Judge Holtzhoff of our District Court "this should not be the inclination of any court as it whittles away a most precious right, the right to reputation, Odgen v. Assoc. of the U.S. Army, 177 F. Supp. 498.

CONCLUSION

The statements made by the appellee were directed to and concerned with subject matter which his employing agency has stated they would not be involved with. Therefore, such statements were not official duties in the sense they are entitled to absolute privilege.

The Court below should be reversed, and the complaint reinstated with the action prosecuted and defended on its merits.

Respectfully submitted,

SAM PHILLIPS
327 Bond Building
Washington 5, D. C.

Appellant Pro Se

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JOINT APPENDIX

[Filed March 10, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAM PHILLIPS,
Plaintiff

vs

SAM KINGSLEY,
Defendant

Civil Action No. 754-61

Room 3611
Personnel Section
U.S. Patent Office
Com. Bldg., 14th & E St., N.W.
Washington, D.C.

COMPLAINT FOR LIBEL AND SLANDER

Now comes the plaintiff who states the following:

1. The Court has jurisdiction in this matter as the amount of damages sought is more than three thousand dollars.

2. During the period of March 15-22, 1960, in the District of Columbia, the defendant did libel and/or slander the plaintiff by maliciously communicating information about the plaintiff which he knew was untrue, the communication and it subject matter not being in the course of any official or statutory duty.

Wherefore, in consideration of the above, the plaintiff prays that the Court award the plaintiff ten thousand dollars general damages and five thousand dollars punitive damages, making the total amount of damages sought fifteen thousand dollars ($15,000.00).

A jury trial is demanded.

/s/ Samuel L. Phillips, Plaintiff
Pro Se
1335 Madison St., N.W.
Washington 11, D.C.

[Filed May 9, 1961]

MORE DEFINITE STATEMENT

Comes now the defendant, pro se, and in response to defendant's motion for more definite statement declares as follows:

1. Nature of utterance or writing -- The full content of this is not known as plaintiff what not there at the time of the utterance or writing. However, in response to a request for aid concerning the acquiring of evidence to present the Veterans Administration regarding plaintiff's proposed schooling under the education portion of the G.I. Bill, said request being made to the Commissioner of Patents who forwarded this request to the defendant with the following written in the margin of plaintiff's written request -- "Can't we be a little helpful about this? What is this man's record?" -- the defendant informed the Commissioner that he had previously sent the plaintiff ~~et~~ to the Supervisory Examiner to work out a program, but the plaintiff did not comply with his order, thereby implying he was a troublemaker, instigator, etc. Of course, additional false and ~~inte~~ derrogatory information may have been supplied to the Commissioner by defendant inasmuch as the Commissioner, a generally helpful individual concerning the welfare of Patent Office employees refused to even see me. However, when I then went back to Mr. Kingsley's Office and asked if I could go to the supervisor to work out a reccomedned program, this request was refused. The full derrogatory statement can be furnished to counsel by his client, otherwise it will have to be delayed until the use of discovery procedures.

2. Facts relied on to establish publication. This will involve statements/ and or writings by Mr. Kingsley or his agents regarding the plaintiff to the Commissioner including the testimony of clerical personnel in the defendant's office, the Commissioner's office, the Commissioner, and the defendant.

3. Dates of publication. This ~~wel~~ would be somewhere between March 14-23, 1960. I cannot be more exact because I was not present

at the time of publication. However, I remember seeing my letter to the Commissioner on the defendant's secretary's desk on March 18, 1961, or possibly the following Monday, March 21, 1960. From the above facts, I imagine that the publication took place around 16th or 17th of March, though this is a mere inference.

Background Statement

Defendant worked at the Patent Office as a design patent examiner ~~ferm~~ from Sept. 1955 until March 1960. In 1957, after experiencing some difficulty in getting education under the G.I. Bill from the Veterans Adminsitration, he asked Mr. Kingsley for a ~~la~~ letter or other statement to the V.A. that both scientific training and training in patent law were necessary for individuals in the patent field. At that time, design examiners needed about half of the courses in ~~phsycial~~ physical science as other patent examiners who received higher pay and had more opportunity both in the Office and outside, and there was a trend for design examiners to take the additional courses and transfer. This left the design section either short-handed or with a lot of new people so Mr. Kingsley discouraged this sort of thing -- transfering to the regular divisions. This was so even though he continously represented to tohers, including Congress, that he was ~~hv~~ having difficulty in getting qualified people when he was in fact discouraging the training of those people already employed in the Office. So he turned my request down, saying that he did not want to get involved with the V.A. This he had a right to do as this was a request outside of his official duties, and he was not legally bound to do anything. However, morally he was. I submitted a resignation that was legally void around the end of Feb. 1960 to take effect May 6, 1960. I also wrote the letter in question now to the Commissioner asking his help. I did not do this in 1957 as this would be going over the head of a superior, but now this factor was not important. I ~~beleve~~ believe that this untruth was fed to the Commissioner so that the defendant would appear as wanting to help, when in fact he was busy protecting his own interests, and that the reason the original request wasn't acted on was due to the unwillingness and

insubordination of the plaintiff.

Plaintiff contends as follows:

1. The request and defendant's response thereto was not in the course of official duty.

2. It does not involve the patent examining operation or plaintiff's performance as an examiner or as an employee.

3. Any derrogatory statement can be shown to be false and malicious by the testimony of plaintiff's superiors and fellow employees in the Patent Office.

/s/ Samuel L. Phillips
1335 Madison St., N.W.
Washington 11, D.C.

A copy of this pleading has been mailed to the U.S. Attorney for D. C. at his Office in the U. S. Court House.

/s/ Samuel L. Phillips

[Filed April 16, 1962]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant by his attorney the United States Attorney for the District of Columbia, and respectfully moves this Court for summary judgment in his favor for the reason there exists no genuine issue of material fact and defendant is entitled to judgment as a matter of law.

Attached hereto, incorporated herein, and made a part hereof, is an affidavit of Robert C. Watson, incorporating Exhibits A, B, and C, which is marked defendant's Exhibit No. 1, and an affidavit of Sam W. Kingsley incorporating Exhibits A, B, and C, which is marked defendant's Exhibit No. 2.

/s/ DAVID C. ACHESON
United States Attorney

/s/ CHARLES T. DUNCAN, Princ.
Assistant U.S. Attorney

/s/ JOSEPH M. HANNON
Assistant U. S. Attorney

/s/ FRANK Q. NEBEKER
Assistant U. S. Attorney

[Certificate of Service]

[Filed April 16, 1962]

GOVERNMENT'S
EXHIBIT NO. 1

AFFIDAVIT OF ROBERT C. WATSON IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

Robert C. Watson, being first duly sworn, deposes and says:

I was the Commissioner of Patents from February 18, 1953, until my resignation from that office was effective at the close of business March 1, 1961.

A letter and attachment, photocopies of which are attached hereto as Exhibit A, dated March 17, 1960, addressed by Samuel L. Phillips to me, was received in my office, as shown by the stamp impressed thereon, on March 17, 1960. Subsequent to that date and prior to March 28, 1960, I requested a report on the subject matter of the letter from the Personnel Officer of the Patent Office, Sam W. Kingsley. In response, I received from Mr. Kingsley a memorandum dated March 28, 1960, a photocopy of said memorandum being attached hereto as Exhibit B.

A further letter, a photocopy of which is attached hereto as Exhibit C, dated April 5, 1960, from Mr. Phillips addressed to me, was received in my office on April 5, 1960, as shown by the stamp impressed thereon. I believe that when I personally received that letter, I called Mr. Kingsley to my office for a report. To the best of my recollection, Mr. Kingley's report at that time consisted of statements corresponding

to those in his memorandum shown in Exhibit B.

To the best of my recollection, Mr. Kingsley has made no statements, written or oral, to me about Mr. Phillips other than those referred to herein.

/s/ Robert C. Watson

[Jurat, dated May 22, 1961]

[Filed April 16, 1962]

GOVERNMENT'S
EXHIBIT NO. 2

AFFIDAVIT OF SAM W. KINGSLEY IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

Sam W. Kingsley, being first duly sworn, deposes and says:

I am the Personnel Officer in the United States Patent Office. I am the defendant in the above entitled action and have personal knowledge of the facts herein set forth.

At some time in the period March 24, 1960, to March 28, 1960, I received a request from Robert C. Watson, who was then Commissioner of Patents, for a report on a letter dated March 17, 1960, addressed to him by Sam Phillips, photocopies of said letter and an attachment being attached hereto as Exhibit A. On March 28, 1960, I forwarded to Mr. Watson the requested report in a memorandum of that date, a photocopy of the said memorandum being attached hereto as Exhibit B.

On or about April 5, 1960, I received a copy of a letter, a photocopy of which is attached hereto as Exhibit C, addressed by Mr. Phillips to Mr. Watson, On or about April 6, 1960, Mr. Watson called me to his office for a further report on Mr. Phillips. In the ensuing conversation, my statements concerning Mr. Phillips were limited, to the best of my recollection, to repeating, in substance, the statements contained in the second paragraph of my memorandum of March 28, 1960.

To the best of my recollection, I have made no statements, written or oral, to Mr. Watson about Mr. Phillips other than those referred to herein.

/s/ Sam Kingsley

[Jurat, dated May 18, 1961]

[Filed April 16, 1962]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. Defendant is, and was at the pertinent times herein, Personnel Officer of the United States Patent Office. In that capacity he was a subordinate to Mr. Robert Watson, Commissioner of Patents from February 18, 1953 to March 1, 1961.

2. Plaintiff was employed as Design Patent Examiner in the United States Patent Office from 1955 to March 24, 1960.

3. On March 17, 1960, plaintiff wrote a letter to Mr. Robert Watson, then Commissioner of Patents, stating he was desirous of obtaining aid from Mr. Watson in arranging for a Veterans' Administration sponsored program of education in patent law and related scientific training. Plaintiff enclosed a proposed letter to him for Mr. Watson's signature stating:

> ". . . it is indispensable for you to acquire a solid scientific training and knowledge of patent law for reasonable expectation of success in the patent field" (Affidavit Exhibits A.)

4. Within about one week Mr. Watson requested defendant, as Personnel Officer of the Patent Office, to provide a report on the subject matter of the letter of March 17, 1960.

5. Pursuant to this request from his superior, defendant replied in a United States Government interoffice memorandum, dated March 28, 1960, that:

"Some months ago, Mr. Phillips came to see me and suggested that I prepare an affidavit in his behalf to the Veterans Administration, stating that patent law courses and further scientific training were essential to his position as a Design Examiner, GS-11. Such a certification was necessary if he were to secure payment of school expenses from the Veterans Administration. I told him I would not prepare such a statement, since the facts as he wanted me to present them were not true.

I suggested that he contact Mr. Yung Kwai, his supervisor, and work out any statement which contained factual information about the qualification requirements of his position here in the Office. Then, based upon such a presentation, further consideration of his request would be granted. He has never complied with this request." (Affidavit Exhibits B.)

6. On April 5, 1960, Mr. Watson received a second letter from plaintiff of the same date (Affidavit Exhibits C.), and as a result called defendant to his office for a report. That report by defendant was oral and consisted of restatements of some or all of the facts contained in his memorandum of March 28, 1960, (Affidavit Exhibits B.).

7. The memorandum report of March 28, 1960, and the subsequent oral report made by defendant at the request of his superior officer, and were made in execution of the duties of defendant as Personnel Director of the United States Patent Office.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Princ.
Assistant U.S. Attorney

/s/ Joseph M. Hannon
Assistant U.S. Attorney

/s/ Frank Q. Nebeker
Assistant U.S. Attorney

[Filed May 7, 1962]

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Now comes the plaintiff, pro se, and opposes the defendant motion for summary judgment on the ground that the alledged statements made by the defendant were not within his official duties as personnel officer of the Patent Office and that the subject matter of the controversy, the recommendation of a course of training for those who wish to qualify to practice before the Patent Office as a patent attorney, is as a matter of law beyond the official function of the Patent Office.

/s/ Sam Phillips
Plaintiff Pro Se

A copy of this pleading and memorandum has been personally served on David Acheson, Esq., U.S. Attorney for D.C. at his office in the U.S. Court House.

/s/ Sam Phillips

MEMORANDUM OF POINTS AND AUTHORITIES

The subject matter of the controversy, the recommendation of a course of training for the vocational objective of patent attorney, has been determined by official statements and regulations of the Patent Office and the Commissioner, to be beyond the official sphere of the Patent Office. The most recent statement of this doctrine can be found on Page 2, General Requirements for Admission to the Examination for Registration to Practice Before the Patent Office, March 1962, which is available to the defendant:

- The Patent Office cannot recommend courses to be pursued in preparing for the examination, nor offer advice as to special training required of persons who wish e to be qualified to practice before the Patent Office as patent attorneys or patent agents. Any statement regarding the above made by the defendant cannot be part of his official duty since the Commissioner has ruled with the effect of law that such a recommendation is beyond the realm of the Patent Office. 35 U.S.C. 6.

"Some months ago, Mr. Phillips came to see me and suggested that I prepare an affidavit in his behalf to the Veterans Administration, stating that patent law courses and further scientific training were essential to his position as a Design Examiner, GS-11. Such a certification was necessary if he were to secure payment of school expenses from the Veterans Administration. I told him I would not prepare such a statement, since the facts as he wanted me to present them were not true.

I suggested that he contact Mr. Yung Kwai, his supervisor, and work out any statement which contained factual information about the qualification requirements of his position here in the Office. Then, based upon such a presentation, further consideration of his request would be granted. He has never complied with this request." (Affidavit Exhibits B.)

6. On April 5, 1960, Mr. Watson received a second letter from plaintiff of the same date (Affidavit Exhibits C.), and as a result called defendant to his office for a report. That report by defendant was oral and consisted of restatements of some or all of the facts contained in his memorandum of March 28, 1960, (Affidavit Exhibits B.).

7. The memorandum report of March 28, 1960, and the subsequent oral report made by defendant at the request of his superior officer, and were made in execution of the duties of defendant as Personnel Director of the United States Patent Office.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Princ.
Assistant U.S. Attorney

/s/ Joseph M. Hannon
Assistant U.S. Attorney

/s/ Frank Q. Nebeker
Assistant U.S. Attorney

[Filed May 7, 1962]

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Now comes the plaintiff, pro se, and opposes the defendant motion for summary judgment on the ground that the alledged statements made by the defendant were not within his official duties as personnel officer of the Patent Office and that the subject matter of the controversy, the recommendation of a course of training for those who wish to qualify to practice before the Patent Office as a patent attorney, is as a matter of law beyond the official function of the Patent Office.

/s/ Sam Phillips
Plaintiff Pro Se

A copy of this pleading and memorandum has been personally served on David Acheson, Esq., U.S. Attorney for D.C. at his office in the U.S. Court House.

/s/ Sam Phillips

MEMORANDUM OF POINTS AND AUTHORITIES

The subject matter of the controversy, the recommendation of a course of training for the vocational objective of patent attorney, has been determined by official statements and regulations of the Patent Office and the Commissioner, to be beyond the official sphere of the Patent Office. The most recent statement of this doctrine can be found on Page 2, General Requirements for Admission to the Examination for Registration to Practice Before the Patent Office, March 1962, which is available to the defendant:

- The Patent Office cannot recommend courses to be pursued in preparing for the examination, nor offer advice as to special training required of persons who wish e to be qualified to practice before the Patent Office as patent attorneys or patent agents. Any statement regarding the above made by the defendant cannot be part of his official duty since the Commissioner has ruled with the effect of law that such a recommendation is beyond the realm of the Patent Office. 35 U.S.C. 6.

[Filed May 17, 1962]

SUPPLEMENTAL OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff and further opposes defendant's motion for summary judgment on the following grounds:

1. The defendant in dealing with the subject matter in question did not, as a matter of law, enjoy absolute immunity. The doctrine of Barr v. Mateo (360 U.S. 564) while extending the doctrine of absolute immunity does not clothe all actions of a government employee with the mantle of immunity. In protecting officials below cabinet rank, said protection goes only to those who in fact act in behalf of the agency head in carrying out his statutory functions and duties. In applying immunity, a distinction is made between an official who has policy making functions and one who does not; the latter class (to which defendant belongs) does not have absolute privilege Coploys v. Gates, 118 F. 2d 16. Here, we have a staff official, not an executive one, dealing in a collateral manner in a subject not pertaining to his official duties or a matter of official concern to the agency involved.

2. The complained of reply went beyond the inquiry, evaded a direct answer of said inquiry, is alleged to be malicious, and therefore is not protected by absolute immunity. The contentions and supporting affidavits of the defendant are somewhat nebulous as to what the report was supposed to consist of. It is suggested that the inquiry was in fact much narrower than defendant contends, and his reply was in effect a defense of his own position, not a true response. For a statement made by an official in connection with his duties to be absolutely privileged, the reply thereto must be (1) not malicious, and (2) not go beyond the bounds of the inquiry. Gaines v. Wren, 185 F. Supp. 774, 775 (1960) citing Barr v. Mateo, supra.

/s/ Sam Phillips

AFFIDAVIT OF PLAINTIFF IN OPPOSITION OF MOTION FOR SUMMARY JUDGMENT

Washington)
District of Columbia) ss.

Sam Phillips, being first duly sworn, deposes and says:

1. That on March 18 or 19, 1960, I believe the former is the correct date though I am not positive, I saw the letter I wrote now known as defendant Exhibit C on the desk of the defendant's secretary.

2. To the best of my recollection, in red ink, there were written the words "Can't we be a little helpful about this? What is this man's record?". This was written in the right middle margin of the first page of Defendant's Exhibit C.

/s/ Samuel L. Phillips

[Jurat, dated May , 1962]

[Filed May 25, 1962]

ORDER

This cause having come on for hearing in open court on defendant's motion for summary judgment and on consideration of the motion and its accompanying memorandum of points and authorities, and plaintiff's opposition and supplemental opposition thereto, and plaintiff's affidavit in opposition thereto, and it appearing to the Court that there exists no genuine issue of material fact and that defendant is entitled to judgment as a matter of law, it is this 25th day of May, 1962,

ORDERED that defendant's motion for summary judgment be and the same hereby is granted, and it is

FURTHER ORDERED that the complaint be and the same hereby is dismissed.

/s/ Edward A. Tamm
United States District Judge

[Certificate of Service]

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,190

SAM PHILLIPS, APPELLANT

v.

SAM KINGSLEY, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

No. 17,190

QUESTIONS PRESENTED

Whether absolute privilege applies to an intergovernmental communication from appellant's superior to the head of the organization concerning a requested report on appellant's work record.

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,190

SAM PHILLIPS, APPELLANT

v.

SAM KINGSLEY, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from the judgment of the District Court filed March 25, 1962, granting appellee's motion for summary judgment and dismissing the complaint (J.A. 11). The notice of appeal was filed June 21, 1962.

In a complaint for libel and slander (J.A. 1) filed March 10, 1961, appellant asserted that appellee "did libel and/or slander the plaintiff by maliciously communicating information about the plaintiff which he knew was untrue . . ." Pursuant to an order of the District Court filed March 3, 1961, appellant was directed to furnish

a more definite statement (J.A. 2) reflecting the nature of the utterances or writings, the facts relied on to establish publication and the persons to whom publication was made.

From the more definite statement it appears that plaintiff was an employee of the Patent Office and that appellant was his superior. Appellant had sought Veterans Administration sponsored schooling and requested of the then Commissioner of Patents a letter stating that appellant needed additional training for his work. (J.A. 2.) This letter was forwarded to appellant by the then Commissioner for a report. The more definite statement states: "the defendant informed the Commissioner that he had previously sent the plaintiff to the Supervisory Examiner to work out a program, but the plaintiff did not comply with his order, thereby implying he was a trouble-maker, instigator, etc." (J.A. 2.) The statement then states there "may" have been additional actionable statements.[1]

When the Commissioner forwarded appellant's letter to the appellee in his capacity as personnel officer, it was to obtain information upon which the Commissioner could respond to appellant's letter. See Exhibits A attached to the Watson and Kingsley affidavit (J.A. 5-7). It is apparently this report to the then Commissioner of Patents by appellee as personnel officer that forms the basis for appellant's claim for damages.

RULES INVOLVED

Rule 56(b), Federal Rules of Civil Procedure provides:

> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

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[1] While appellee thinks it is patent that the complaint, together with the more definite statement, fails to state a cause of action, appellee will address himself to the issue of absolute privilege which was the basis for the District Court's ruling.

Rule 56(c), Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law.

SUMARY OF ARGUMENT

The District Court correctly held absolute privilege to apply to the asserted actionable statements by appellee made in connection with his requested report to his superior, the Commissioner of Patents, regarding appellant's work record.

ARGUMENT

There Being No Genuine Issue Of Material Fact, Appellee Was Properly Awarded Summary Judgment On The Asserted Claim Of Absolute Privilege

Appellant's single assertation in his "Points Raised on Appeal", filed in this Court on August 8, 1962 [2] is that the District Court erred in its ruling on the basis of absolute privilege for the reason that such privilege "does not extend to areas not within the agency's statutory function, the official's duties, the maligned individual's duties, and which area has been specifically excluded as a field of activity by the agency involved by the agency head." See also Br. 2.[3] Appellee respectfully submits that the

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[2] We note plaintiff has failed to comply with Rule 17(b)(3) and (7) in that he has failed to include in his brief a Statement of Points and has failed to indicate which of the cases cited he principally relies upon.

[3] Appellant can point to no authority within the Patent Office which precludes the type report relied upon by appellant as actionable. The General Requirements for Admission to the examination for registration to practice before the Patent Office, March 1962, which appellant attached to his Opposition to the Motion For

nexus between this report and appellant's official duty is so patent as to warrant no comment other than to say where the head of a government agency seeks a report on the work record of a subordinate employee, the intermediate superior is duty-bound to make his report. Such a duty is inherent in the very existence of the agency and the relationship of superior and subordinate personnel.

Because public officials must be free to perform their duty without fear of damage suits, absolute and unqualified privilege attaches to their statements. See *Barr* v. *Matteo*, 360 U.S. 564 (1959) and *Howard* v. *Lyons*, 360 U.S. 593 (1959). While this rule of law has foundation in cases involving high government officials, its applicability to inter-governmental communications becomes all the more strong on consideration of the fact that the day-to-day operation of the government requires communications between subordinates and superiors regarding matters of fact as well as judgment. If such privilege extends to public statements of high officials *a fortiori* it must extend to administrative functions within government, particularly personnel evaluation. Absolute privilege has been held to attend such inter-office communications. *Gaines* v. *Wren*, 185 Fed.Supp. 774 (N.D. Ga., 1960) and *Poss* v. *Liberman*, 299 F.2d 358, (2nd Cir. 1962), *affirming* 187 F.Supp. 841 (E.D.N.Y., 1960). *Farr* v. *Valentine*, 30 App. D.C. 413 (1912). See also *United States ex rel Parravicino* v. *Brunawick*, 63 App. D.C. 63, 69 F.2d 383 (1934).

The issue presented by appellant in this case is quite similar to the issue presented in *Blyther* v. *Dyson*, No. 16,817, argued October 2, 1962. See also the authorities cited in appellee's brief filed therein.[4]

Summary of Judgment patently has no bearing upon appellant's authority or lack of authority to report to the Commissioner of Patents concerning the latter's request for information about the work record of the subordinate appellant.

[4] A copy of appellee's brief in *Blyther* v. *Dyson, supra*, has been provided appellant. See certificate of service.

CONCLUSION

Wherefore, it is respectfully submitted that the instant appeal be dismissed as frivolous [5] for the reasons the complaint and more definite statement failed to state a claim on which relief could be granted and that absolute privilege attached to the statements made.

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[5] Cf. *Dreos* v. *Sitnick*, No. 16,973, *decided* October 18, 1962.

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